REMARKS

In the instant office action, Claims 1-12, 15-26, 29 and 30 were rejected under 35 U.S.C § 102(e) as being anticipated by Shahabuddin (U.S. Patent 6,877,035, hereinafter Shaha).

Applicants respectfully submit that the Examiner has failed to establish the prima facie case as each and every element of independent claim 1, 15, 29 and 30 are not taught by the Shaha patent. See Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 U.S.P.Q.2D (BNA) 1913, 1920 (Fed. Cir.), cert. denied, 493 U.S. 853, 107 L. Ed. 2d 112, 110 S. Ct. 154 (1989) (explaining that an invention is anticipated if every element of the claimed invention, including all claim limitations, is shown in a single prior art reference). See Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556, 1560, 225 USPQ 253, 256 (Fed. Cir. 1985) (explaining that the identical invention must be shown in as complete detail as is contained in the patent claim). See Verdegaal Bros., Inc. v. Union Oil Co., 814 F.2d 628, 631, 2 U.S.P.Q.2D (BNA) 1051, 1053 (Fed. Cir. 1987) (explaining that a prior art reference anticipates a claim only if the reference discloses, either expressly or inherently, every limitation of the claim). See Kloster Speedsteel AB v. Crucible, Inc., 793 F.2d 1565, 1571, 230 U.S.P.Q. (BNA) 81, 84 (Fed. Cir. 1986) ("Absence from the reference of any claimed element negates anticipation.")

Unfortunately, Shaha clearly does not teach or suggest, “indicating application entitlement to the request for resources in response to the determining and if the request is excessive including a throttling of the requested resources when the application is not entitled to

the additional resources in accordance with the entitlement profile" as recited in amended claim 1. Examiner has also agreed in the instant office action that Shaha does not teach or suggest this aspect of present invention thus obviation a rejection under 35 U.S.C § 102(e).

However, the Examiner further argued that claims 13 and 27 (now incorporated in claims 1 and 15 respectively) were unpatentable under 35 USC 103(a) over U.S. Patent 5,666,481 to Shaha in view of U.S. Printed Publication 2005/0165925 to Dan et al. (hereinafter "Dan"). In the instant office action, the Examiner indicated that "Dan discloses a service level agreement monitor continually monitoring whether the system is meeting or will meet service level based on established priorities for running clients" and that "a planning monitor has authority to make adjustments (more or less resources) to running clients."

Applicants respectfully submit that Shaha combined with Dan does not suggest or teach aspects of now cancelled claim 13. Consequently, Shaha combined with Dan also does not teach or suggest claim 1, claim 15, claim 29 or claim 30 as they have been amended to incorporate this aspect of the present invention as well.

For example, the Examiner has indicated that Dan concerns "established priorities for running clients". However, Dan does not concern policing resources by "intercepting an advance request for resources from an application …. prior to utilization of the pool of resources to execute the application" as recited in claim 1. It should be noted that aspects of the present invention do not necessarily operate on running clients but on the requests for resources made in

advance prior to execution. Support for this aspect of the present invention can be found in paragraph [0017] of the specification and thus no new matter has been suggested.

Further, the Examiner also indicated in the instant action that Dan concerns "a service level agreement monitor continually monitoring whether the system is meeting or will meet service level based on established priorities." A service level agreement is defined in Dan as: "The service level agreements 230 specify performance elements to be provided by the server cluster 40 to clients 35. These performance elements comprise the throughput for each application that is supported and, optionally, the response time for the specified throughput." (Paragraph [0039] of Dan). Essentially, the service level agreement (SLA) is a legal contract and thus an abstract concept. Consequently, it is neither a direct or indirect measure of the computing resources but a wishful list of performance requirements and the penalties one side or the other side shall pay in the event they do not abide by the contract. Therefore, the only measurement performed by Dan is the amount or degree the SLA contract has been breeched or that certain performance requirements have been/have not been met. It does not measure the amount of computing resources or attempt to fit applications based on computing resources (i.e., disk space, CPU cycles required, memory requirements, bus speed requirements).

In contrast, claim 1 recites a policing of resources that operates by "intercepting an advance request for resources from an application admitted to access a pool of resources associated with the computing utility facility", "acquiring an entitlement profile associated with the application to determine if application is entitled to requested resources over a time period",

and "determining if the request for resources exceeds the entitlement value associated with the sliding window".

Unfortunately, the resources associated with the computing utility facility is not the same or equivalent to the SLA described in Dan. First, the SLA is a request for certain performance levels but does not describe details about the resources required by the application. Hence, it is not possible for Dan to accurately determine what resources are required for an application since the SLA is driven by throughput for an application and response time. Second, the SLA is best determined while the applications are executing to measure if the SLA is in fact being met or the SLA contract is being breeched. In summary, Dan does not operate upon a request for resources and a comparison of the available resources in accordance with an entitlement profile having resources and timing information as in claim 1.

It therefore follows that it is also impossible for Dan to operate by "indicating application entitlement to the request for resources in response to the determining and if the request is excessive including a throttling of the requested resources when the application is not entitled to the additional resources in accordance with the entitlement profile" as recited in claim 1. Examiner's assertion that Dan operates "a planning monitor has authority to make adjustments (more or less resources) to running clients" has no basis since Dan does not deal in "resources". Unfortunately, if the SLA is not being met then Dan must relocate the application to another machine or cluster which means downtime, SLA penalties to be incurred and other undesirable side affects. (Paragraph [0053], [0054]) Since Dan does not know the resources required by an

application it is not possible for Dan to throttle the requested resources. At the very best, Dan would instead move an application to another machine or cluster but it is not clear that the resources would change at all.

Contrary to the Examiner's assertion, Shaha alone or in combination with Dan does not teach each and every feature of the invention as claimed. It is well settled that "[t]he examiner bears the initial burden of factually supporting any prima facie case of obviousness. To establish a prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. In re Royka , 490 F.2d 981, 180 USPQ 580 (CCPA 1974). To make a prima facie case of obviousness, the Examiner must determine the "scope and content of the prior art," ascertain the "differences between the prior art and the claims at issue," determine "the level of ordinary skill in the pertinent art," and evaluate evidence of secondary considerations. Graham v. John Deere, 383 U.S. 1, 17, (1966); KSR Int'l Co. v. Teleflex Inc., 550 U.S. ___ (2007); see also M.P.E.P. § 2141.

And, when determining the differences between the applied art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. M.P.E.P. § 2141.02(I). "All words in a claim must be considered in judging the patentability of that claim against the prior art." In re Wilson , 424 F.2d 1382, 165 USPQ 494, 496 (CCPA 1970). If the examiner does not produce a prima facie case, the applicant is under no obligation to submit

evidence of nonobviousness." M.P.E.P. § 2142. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. In re Fine , 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

For at least these reasons, independent claims 1, 15, 29 and 30 as currently filed are in condition for allowance. Dependent claims 2-12, 14, 16-26, and 28 are allowable independently as well as by virtue of their direct or indirect dependency on claims 1 and 15 respectively.

Applicants have made a diligent effort to place the aforementioned claims in condition for allowance. Accordingly, Applicants respectively request a withdrawal of the rejections and immediate allowance of the pending claims. Of course, should there remain unresolved issues or the Examiner believes a discussion appropriate, it is respectfully requested that the Examiner telephone Leland Wiesner, Applicants' Attorney at (650) 853-1113 so that such issues may be resolved as expeditiously as possible.

For these reasons, and in view of the above remarks, this application is now considered to be in condition for allowance and such action is earnestly solicited.

Respectfully Submitted,

___03/14/2008___
Date

_____/Leland Wiesner/_____
Leland Wiesner
Attorney for Applicants
Reg. No. 39424

Leland Wiesner
Wiesner and Associates
366 Cambridge Avenue
Palo Alto, California 94306
Tel. (650) 853-1113